Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term 2000

L.T. BRANT,
Petitioner,
v.
EARLE LILLY, PIRE & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLAGE of MEDICINE, EARNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDE LOHNER, ANN M. HODGES AND JOEL A. NASS,
Respondent.

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

APPENDICES A-B-C-D-E

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APPENDIX A

Cause No. 90-53676

Mark Metzger	§ IN THE DISTRICT
	§ COURT OF
V.	§ HARRIS COUNTY,
	§ TEXAS
	§ 234th JUDICIAL
Judy Sebek, et al	§ DISTRICT

ORDER

Came on to be considered in the above-styled and numbered cause Defendants' Motions for Sanctions against Plaintiff Mark Metzger ("Metzger") and his attorney, L.T. Bradt ("Bradt"). Based on judicial notice taken of the pleadings, motions, and briefs in the court's file, the statement of facts of proceedings in the 269th District Court, the opinions of the numerous trial and appellate judges in this case and in related and resulting cases in federal and state courts, and the testimony and arguments presented at the sanctions hearing in this court, the Court makes the findings of fact and conclusions of law set forth below. Because of the number of mixed questions of law and fact involved in this case, findings of fact and conclusions of law are interspersed.

Procedural Background

This suit was originally filed by Plaintiff's former attorney, James A. Drexler, in U.S. District Court on July 13, 1989. After extensive proceedings in that court, on August 16, 1990, the Hon. Norman Black dismissed the case for want of jurisdiction, indicating that the federal claims based on 28 U.S.C. § 1983 and the RICO Act were without merit.

The Order indicated that

> While the finder of fact would certainly be interested in deposition testimony in which any Defendant admitted entering into a conspiracy with the other Defendants to violate Plaintiff's civil rights or admitted joining an enterprise to injury Plaintiff's property or business, it is not likely that such discovery will ever by available.

The case was refiled by Drexler in the 269th District Court on September 24, 1990, against the Plaintiff's former wife, her lawyer, her lawyer's firm, two hospitals, and six psychiatrists and psychologists. On July 12, 1991, Bradt filed the Plaintiff's Second Amended Petition, adding another attorney as a defendant. Over the next five months, Bradt filed three more amended petitions, concluding with the Fifth Amended Petition upon which the Plaintiff went to trial. Except for minor differences (some of which are noted in the footnotes), the petitions were largely a repetition of the proceeding ones.[1]

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[1] In addition to adding Joel Nass as defendant, the Second Amended Petition added a claim for exemplary damages for 10 times the amount of actual damages, and a claim for attorney's fees and a permanent injunction. The Third Amended Petition added claims for fraud and extortion, pled actual damages of $7.5 million, and expanded the RICO claims by adding the hospitals, Harris County Children's Protective Services, and the Texas Department of Human Services as "associated enterprise." The Fourth Amended Petition added claims for abuse of process, fraud, and raised alleged actual damages to $25 million.

Trial began on March 31, 1992. On May 7th, 1992, after more than 20 days in trial and testimony from 25 witnesses, the trial judge granted a directed verdict. A post-trial hearing was held on May 15th, 1992 regarding sanctions to be entered against Metzger and his attorneys., and by order dated May 21, 1992 they were sanctioned for almost $1 million in expenses and attorneys' fees incurred by the Defendants in the litigation.

On appeal, the First Court of Appeals affirmed the directed verdict, but reversed the order of sanctions. *Metzger v. Sebek*, 892 S.W.2d 20 (Tex.App.-Houston [1st Dist.] 1994, writ denied). As to Metzger, the appellate court found that by lying in an affidavit he had committed a "despicable, shameful act," and should be sanctioned under Rule 13. However, the appellate court held that the amount assessed against him was excessive, and remanded for consideration of the amount of sanctions that would "fit the crime" of filing the false affidavit. As to Bradt, the appellate court reversed and remanded for consideration of his recusal motion, and thereafter of the Defendants' request for sanction against him pursuant to Rule 13. Upon remand, the trial judge voluntarily recused himself, and the case was transferred to this court for proceedings pursuant to the appellate court's mandate.

The Allegations of Conduct of Bradt Meriting Sanctions

The Defendants' motions for sanctions assert that the Plaintiff's Fifth Amended Petition and the Plaintiff's various responses to each of the Defendants' motions for summary judgment were signed by Bradt in violation of Rule 13.[2] Taken

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[2] Although the Plaintiffs' Original Petition was also listed by Defendants prior to the sanctions hearing, they dropped any claim for sanctions based thereon as that petition was signed by neither Metzger nor Bradt and thus cannot form the

at face value, the petitions alleged a combination of literally thousands of individuals for the purpose of bringing hardship upon the Plaintiff. After winnowing the multifarious torts, statutory violations, and other forms in which these wrongs were asserted, the gravamen of Plaintiff's claims was that the Defendants intentionally manufactured evidence that the Plaintiff sexually abused his son for the purpose of (a) helping his ex-wife obtain an unfair advantage in their divorce proceedings, or (b) obtaining counselling fees for treating the child. The predicate elements for sanctions under Rule 13 are that the pleading filed was (1) groundless, and (2) brought in bad faith or for purposes of harassment.

Were the Allegations in the Pleading Groundless?

The evidence is overwhelming that the Plaintiff's causes of action were groundless. The appellate court affirmed the directed verdict on all of Plaintiff's claims "because (1) some were not viable to begin with, and (2) there was no evidence to support the ones that were viable." *Bradt v. West*, 892 S.W.2d 56,64 (Tex.App.-Houston [1st Dist.] 1994, writ denied). The appellate opinions stemming from the trial cover 62 pages and 117 headnotes in the Southwestern Reporter, 2d Series, most of which set forth in detail the numerous failings in Plaintiff's pleadings. However, by way of example, the claims asserted were groundless in the following respects:

> the conduct of Metzger's son was so startling and suggestive that, not only did the Defendants have a duty to report it, they faced criminal prosecution if they did not; Texas Family Code §§ 34.01, -.02(d), and -.07;

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basis for Rule 13 sanctions against them.

- mental health professionals such as the Defendants owe no duty to a parent such as Plaintiff with respect to misdiagnosis; *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994);[3]

- having requested entry of an agreed judgment in his divorce proceeding, Plaintiff cannot later attack that judgment; *see Casu v. Marathon*, 896 S.W.2d 388 (Tex.App.--Houston [1st Dist.] 1995, writ denied);

- a court-appointed psychologist such as Defendant Guez is immune from prosecution; *Bird v. W.C.W.*, *supra*;

- the negligent infliction of emotional distress claim is not recognized in Texas; *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993);

- Metzger had no standing to assert a RICO claim, and did not make any argument for extension of the law; *Metzger v. Sebek*, 892 S.W.2d at 54, fn. 31;

- There is no cause of action against an opposing party's counsel (I.E. Defendants Lilly and Nass) arising from the discharge of

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[3] Although not issued until January 5, 1994, previous cases had reached the same result. *Vineyard v. Kraft*, 828 S.W.2d 248 (Tex.App.--Houston [14th Dist.] 1992, writ denied; *Dominguez v. Kelly*, 786 S.W.2d 749 (Tex.App.--El Paso 1990, writ denied).

counsel's duty to his own client; *Bradt v. West*, 892 S.W.2d at 71-72 [citing cases]; and

- Defendant Lilly did not infuse child abuse allegations into the family law proceeding in January of 1987; *Metzger v. Sebek*, 892 S.W.2d at 27.

Even in those few instances where Plaintiff was able to find something that was suggestive of error in the slightest degree in the Defendants' extensive records and treatment, the appellate court correctly noted that is impossible to conceive how such incidents support Plaintiff's grandiose allegations. *Metzger v. Sebek*, 892 S.W.2d at 44-45. Accordingly, the record before this court establishes that the Plaintiff's causes of action were groundless.

Were the Allegations Brought in Bad Faith or for Harassment

As with any effort to determine the intent of an accused, because of the improbability of an admission of guilt the Court must look to circumstantial evidence. Several actions occurring before, during, and after the trial bear on the bona fides of Bradt in asserting the claims set forth in the Plaintiff's pleadings. While some of the actions noted below are beyond the scope of punishment in this proceeding, they cannot be ignored because (1) they reflect on the motivation of counsel in taking the actions that are punishable herein, (2) they are separated into different proceedings only because Bradt chose to raise them repeatedly in different courts, (3) they reflect certain patterns and habits of Bradt that became more apparent when viewed in context, and (4) they reflect the evidence indisputably known to Bradt in signing the pleadings herein.

Subsequent Suits

Soon after the directed verdict, Bradt brought two new suits in his own name against literally everyone who dared to oppose him in the underlying trial. The first action was brought in federal court against the trial judge, the trial court reporter, the attorneys for the Defendants, Metzger's former wife, and the prosecutor who prosecuted the trial judge's contempt charge in federal court. The federal court dismissed the case, and sanctioned Bradt by ordering him to pay the attorney fees and costs incurred by the trial judge and the prosecutor. Bradt then personally filed suit in state court against the trial judge, all the Defendants, all their attorneys, all their insurers, and the contempt prosecutor. *See Bradt v. West, supra.* Summary judgment was granted against Bradt, and on appeal the appellate court not only affirmed but granted sanctions against Bradt for filing a frivolous appeal. *Id.* at 78-81. The appellate court noted that Bradt's actions showed bad faith by turning a blind eye to established law, by adding new causes of action which he knew were improper, by avoiding direct inquiries from the court about the groundlessness of his claims, and by filing an affidavit in response to the motion for summary judgment in that case that he knew or should have known was incompetent and groundless. *Id.* at 79-80.

The filing of these subsequent suits is not sanctionable in this proceeding. However, the filing of multifarious suits and claims and the findings of bad faith therein provide strong evidence that the motivation of Bradt in the underlying case was personal animus rather than zealous advocacy. An attorney acting in bad faith will file a flurry of vindictive and harassing satellite suits to try to punish his opponents. The pattern of Bradt's activities indicates a purpose of bad faith and harassment almost unparalleled in Texas jurisprudence.

Lack of Discovery

Rule 13 provides that when an attorney signs a pleading, such is a certification that "to the best of their knowledge, information, and belief *formed after reasonable inquiry* "to the best of their knowledge, information, and belief *formed after reasonable inquiry* the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." In this case, although Plaintiff sued 12 different Defendants, no deposition was taken of any of them before trial. Any deposition, indeed even the most cursory informal inquiry, would have disclosed that:

- not only did the Defendants not have regular meetings and communications in furtherance of their conspiracy (Fifth amended Petition, ¶ 4.2[G], many of them had never even met each other (see, e.g., Vol. X, pp. 2296-97 and pp. 2343-44; Vol XII, p. 2963);

- in medical nomenclature (or in general English usage, for that matter) the term "rule out" does not mean that certain possible diagnoses have been discarded, but represent possible diagnoses under consideration (Vol IX, pp. 2050-51) *see Metzger v. Sebek*, 892 S.W.2d at 44; and

- not only did the Defendant Cox not implicate the Plaintiff in his testimony before the grand jury (Amended Petition, ¶ 4.2[E]), he testified to the contrary that his evaluation of the Plaintiff was inconsistent with a sex abuser.

The record establishes that the pleadings signed by Bradt were not made after reasonable inquiry, and thus violated Rule 13.

Knowing Misrepresentations at Trial and at the Sanctions Hearing

As noted by the appellate court, "Metzger's attorneys misread documents and attempted to mislead the judge and some witnesses." *Metzger v. Sebek*, 892 S.W.2d at 39. The record and the appellate opinion indicate that this was not a matter of isolated lapses but a consistent pattern of conduct. Without repeating the many instances cited in the appellate opinions, a few brief examples are:

- Bradt suggested that Defendant Taylor had cast aspersions that the Plaintiff had done something wrong, when she actually had only reported that the family was under stress due to a criminal proceeding against the Plaintiff (Vol. III, pp. 655-58);

- Bradt quoted a record as finding "a chronic history of abandonment" when it actually reported only "a chronic history of abuse" (Vol. II, pp. 329-30); and

- Bradt and Metzger throughout the trial and again at the sanctions hearing stated without qualification that Dr. Cox gave sworn testimony that Metzger sexually abused his son, a charge they both finally retracted (after considerable evasion) when this court demanded proof.

Black's Law Dictionary defines "bad faith" in part as "a design to mislead or deceive another." Black's Law Dictionary 127 (5th Edition 1979). Accordingly, an attorney or party who seeks to mislead a court and jury clearly is acting in bad faith. As noted above, while these actions may not themselves be punishable under Rules 13, they nevertheless show an intent to

win regardless of the truth. The existence of bad faith during and after the trial present circumstantial evidence of the same prior to the trial.

Disregard for the Rules of Practice & Procedure

As noted by the appellate court, "Metzger's attorneys repeatedly violated the order in limine; violated other orders of the court' interrupted the judge; grumbled audibly about the rulings; laughed at the judge..." *Metzger v. Sebek*, 892 S.W.2d at 39. Again, the record and the appellate opinion indicate that this was not a matter of isolated lapses but a consistent pattern of conduct during the trial. By way of brief examples, attorney Bradt:

- violated the trial judge's order in limine by introducing and repeating the highly prejudicial item of a polygraph test (Vol. III, p. 690); and

- violated the trial judge's order in limine by introducing and repeating allegations of infidelity by the Plaintiff's former wife (Vol. III, p. 776).

The trial judge repeatedly admonished Bradt, usually to no avail. The record reflects that the trial judge carefully considered whether Bradt's actions might have been the result of mistake or mental lapses as opposed to intentional acts. However, the record of the trial and the sanctions hearing, as well as the repeated warnings and the continued violations, overwhelmingly supports the trial judge's conclusion that such actions were intentional.

Again, these actions are not themselves punishable under Rules 13, but they indicate an intent to win regardless of the rules. The rules were established "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants." TEX. R.

CIV.P. 1. An attorney or party who intentionally and repeatedly violates such rules must be seeking something other than such goals, and is acting in bad faith.

The Nature of the Conspiracy and Claims Alleged

As advocates for the interests of another, trial counsel must believe in the facts are related by the client and be given wide latitude in asserting such claims even against strong contradictory evidence. However, this is not a license for the professional to choose to be blind to the obvious. At some point, a client's allegations become so patently false that counsel must refuse to advocate them. *See* Texas Disciplinary Rules 3.01, 3.03(a)(5), 3.03(b), and 3.04(b). Under the provisions of Rule 13, if counsel makes reasonable inquiry and determines that a pleading is groundless and cannot be asserted in good faith, the pleading must not be filed.

In this case, the conspiracy alleged among thousands of independent actors is patently incredible. The notion that thousands of very busy people would join a plot to bring trouble upon a single individual previously unknown to them does not comport with reality. When faced with allegations so contrary to common sense, counsel must exercise care to ensure that the case had merit. An attorney cannot bring suit alleging a conspiracy with Martians and avoid rule 13 sanctions by asserting the duty to believe one's client.

Further, the critical harm suffered by the Plaintiff in this case is obviously the indictment for sexual abuse. The entire transcript of the grand jury proceedings were available to Bradt. Such transcript indicates unequivocally that none of the Defendants accused the Plaintiff of abuse or sought his indictment.

Additionally, in the context of divorce and child custody proceedings, counsel must recognize that the potential and motivation for harassment is very high. Such proceedings inherently involve damage to the most intimate and cherished personal relationships, with some of the most disruptive and traumatic personal consequences that the participants may ever face. It is natural that the individuals involved may desire revenge. The professionals who handle such proceedings must ensure that they are not being used as a weapon for such revenge.

Throughout the trial, and especially in his own testimony, it is obvious that the Plaintiff felt cheated by the outcome of the divorce. Naturally, he was also furious about the allegations of and indictment for sexual abuse. Further, he completely discounted the extremely well-documented and bizarre behavior of his 3 year old son as innocent and normal. Faced with these facts, Bradt must have known that his client's motivation was to exact revenge against his former wife and those who attempted to help the family.

The concept of "harassment" in Rule 13 must mean more than vexing or difficult, as all litigation is likely to be so. Instead, the vexation must be related to some improper use of the litigation for purposes collateral to the suit stated. At the sanctions hearing in this court, Bradt admitted knowing that his client's purpose in bringing this case was to try to change the result of the divorce proceeding. This may be a proper purpose for further proceedings in the family court, but it an improper purpose for proceedings against all the health care providers in collateral litigation.

This is not to ignore the extreme agony suffered by the Plaintiff if in fact he was falsely accused. Nor should it be ignored that governmental and quasi-governmental officials may cause tremendous harm if they trample upon fragile family

relationships without cause. However, one who is treated improperly or even rudely by a government official, and who then sues them despite knowledge that an action at law cannot be brought thereon, is acting in bad faith and for the purpose of harassment.

The Number of Defendants

The number of defendants sued in this case is not alone evidence of bad faith. Indeed, it appears to be quite common to sue all potential parties and then find out the facts later and nonsuit those without liability. Without opining on whether such practice itself meets the requirements of Rule 13, Bradt did not much more than that in this case. Having sued virtually everyone even tangentially involved in trying to treat his son, Bradt made little investigation as to whether any of the Defendants actually did any of the acts alleged, ignored the evidence before him that they did not, never nonsuited anyone, vigorously tried to keep all the Defendants in the suit (including the use of the perjurious Metzger affidavit), and then protracted the trial for over one month. Such appear more consistent with the acts of an attorney who cannot be troubled with the facts rather than one attempting to determine the truth.

The Length of Trial

Similarly, while a long trial is not alone evidence of harassment, an individual intending to harass would obviously prefer long, drawn-out proceedings to make them as painful as possible. Although the Plaintiff's case lasted for more than a month, it is clear that if Bradt and his co-counsel had not been restrained by the trial judge, it would have lasted far longer than that. The trial judge attempted to place some restraints on the case by instituting time limits and eliminating certain claims and irrelevant witnesses long before the Plaintiff rested, as to all of which Plaintiff's counsel objected and sometimes paid no heed.

In this case, the testimony presented by Plaintiff most often resembled a fishing expedition rather than a trial. Pages and pages of the statement of facts are devoted to asking witnesses to identify the pages on which their handwriting appears, the custody of various documents, and the source of information written down 5 or 6 years before. Taken together, the length of the trial and the irrelevancy of most of it constitute circumstantial evidence that Bradt's purpose in filing suit was harassment.

Appropriate Sanctions Against Metzger

As discussed above, it is clear from the trial transcript that Plaintiff's claims were groundless. The most fitting sanction for bringing a frivolous action is to see that the attorneys' fees incurred as a result are reimbursed. The evidence presented in this court indicates that the Defendants passed their motions for summary judgment because they felt they would be denied based on Metzger's affidavit. Accordingly, all fees and expenses incurred by the Defendants thereafter arguably could have been avoided but for the affidavit. Such fees and expenses preparing for and trying this case approximated $1 million. However, the Court of Appeals found such sanction to be too severe, and accordingly only a lesser amount can be considered.

Because of the breadth of his allegations, the trial made necessary by the false affidavit was necessarily an extended one. However, absent the false affidavit, the summary judgments likely would not have disposed of the case in its entirety. Further, the "antics"[4] of Metzger's attorneys (for which he does not appear to be answerable) played a part in the extreme and unnecessary length of the trial. At the very least, however,

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[4] The term employed by the appellate court. *Metzger v. Sebek*, 892 S.W.2d at 29

Metzger's affidavit necessitated 10% of the fees and expenses, and accordingly a sanction of $100,000.00 seems just and appropriate.

Assessment of this small part of the horrendous expenses attending this litigation would be just according to Metzger's own standards. Metzger sought $25 million in actual damages and $250 million in punitive damages for what he alleged were the lies by the Defendants. It does not seem unfair to require him to pay 1/2750 of that amount for the proven lies he made in return.

Appropriate Sanctions Against Bradt

Assessing sanctions against an attorney is not an action to be undertaken lightly. In a system in which litigants must largely depend upon legal professions to gain access to the courts, the potential chilling effect of holding counsel responsible for the substance of the charges made must be carefully weighed. Nevertheless, both the Texas Legislature and the Texas Supreme Court have repeatedly made provision for sanctions against frivolous pleadings and directed that they be assessed against the attorney involved where appropriate.

This case is distinguishable and extraordinary because attorney Bradt was informed of the obvious legal impediments to Plaintiff's claims, knew of the unquestionable evidence contrary to those claims, took a shotgun approach to joining sanctions previously assessed against Bradt in smaller amounts have had no effect to date on his behavior. No judicial warnings, rebukes, or minor sanctions to date have slowed his personal efforts to see that this litigation is protracted, convoluted, and wasteful. Further, the Court is convinced that Bradt's personal animus is as much to blame for the excesses of

this litigations as his client, and he should not be sanctioned any less. Accordingly a sanction of $100,000.00 seems just and appropriate.

Conclusion

It is therefore ORDERED that Defendants have and recover from L.T. Bradt attorney's fees and related expenses in the sum of One Hundred Thousand Dollars ($100,000.00).

Further, it is ORDERED that Defendants have and recover from Mark Metzger attorney's fees and related expenses in the sum of One Hundred Thousand Dollars ($100,000.00)

SIGNED this day, April 8, 1996.

/s/ Scott Brister
Hon. Scott Brister
Judge, 234th District

APPENDIX B

COURT OF APPEALS
FIRST DISTRICT OF TEXAS
JUDGMENT

L.T. BRADT, APPELLANT

NO. 01-96-00943-CV V.

JUDY SEBEK, EARLE LILLY, PIRO & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES and JOEL A. NASS, APPELLEES

Appeal from the 234th District Court of Harris County, Texas. (Tr.Ct.No. 90-53676). Panel consists of Justices Cohen, Nuchia, and Duggan. Opinion delivered by Justice Duggan.

The cause heard today by the Court is an appeal from the judgment signed by the court below on April 8, 1996. After submitting the cause and inspecting the record of the court below, the Court rules as follows: (1) in accordance with the joint motion of appellant L. T. Bradt and appellee Judy Sebek and this court's order of June 3, 1999, the judgment of the court below in favor of appellee Sebek is reversed and a take-nothing judgment is rendered as to her; (2) with respect to the remaining

appellees, there was no reversible error in the judgment. It is, therefore, **CONSIDERED, ADJUDGED,** and **ORDERED** that the judgment of the court below-in favor of appellee Sebek be **reversed** and a take-nothing judgment **rendered** as to her; as to the other appellees the judgment of the court below is in all things **affirmed**.

It is further **ORDERED** that the appellant, L.T. Bradt, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Cohen, Nuchia, and Duggan.

Judgment rendered January 13, 2000.

Court of Appeals of Texas,
Houston (1st Dist.).

L.T. BRADT, Appellant,
v.
Judy SEBEK, Earle Lilly, Piro & Lilly, P.C., Depelchin Children's Center Baylor College of Medicine, Ernest Kendrick, Michael D. Cox, Jean Guez, Barbara Taylor, Luisa Maria Acevedo Lohner, Ann M. Hodges and Joel A. Nass, Appellees.

No. 01-96-00943-CV.

Jan. 13, 2000.
Rehearing Overruled April 7, 2000.

Following dismissal of his federal claims in federal district court, former husband brought suit in state court against his former wife, her attorney, and others, alleging various causes of action. The 269th District Court, Harris County, David West, J., directed verdict against husband on all causes of action and assessed sanctions against him and each of his trial attorneys for $994,000. Husband and his attorneys appealed. Following affirmance of the directed verdict and remand of only the sanctions award, 892 S.W.2d 20, and after the trial judge's voluntary recusal, the District Court, Scott Brister, J., ordered husband and one of his attorneys to each pay $100,000 in sanctions to defendants. Attorney appealed. The Court of Appeals, Lee Duggan, Jr., J. (Retired), held that: (1) $100,000 sanction against attorney was a civil sanction, requiring review for abuse of discretion; (2) fact that attorney was twice held in contempt for his conduct during the underlying trial did not preclude imposition of sanctions for his pre-trial conduct; (3) all of husband's causes of action were groundless; (4) that attorney personally sued opposing parties, their counsel, and court

personnel following directed verdict against his client in the underlying suit was sufficient evidence of attorney's bad faith and intent to harass, prior trial of that underlying suit, to warrant sanctions; and (5) attorney was responsible for each groundless pleading, and thus, imposition of $100,000 in sanctions was warranted, and even disproportionately small.

Affirmed.

West Headnotes

[1] Appeal and Error 984(1)

The Court of Appeals reviews a trial court's sanctions order for filing a groundless pleading in bad faith or for purposes of harassment under an abuse of discretion standard. Vernon's Ann. Texas Rules Civ. Proc., Rule 13.

[2] Appeal and Error 946

The test for abuse of discretion is deferential to the trial court; whether the court acted without reference to any guiding rules and principles; therefore, it is not necessarily an abuse of a trial court's discretion if under the same facts the Court of Appeals would decide the matter differently, or if the trial court committed a mere error in judgment.

[3] Costs 2

The trial court's discretion to impose sanctions is limited only by the requirement that its order be just and that the sanction imposed be directly related to the harm done by the sanctioned conduct.

[4] Courts 85(2)

Courts apply the same rules of construction to rules of procedure as to statutes.

[5] Courts 85(2)

When a rule of procedure is clear, unambiguous, and specific, courts construe its language according to its literal meaning.

[6] Courts 85(2)

Rule interpretation is a pure question of law over which the judge has no discretion.

[7] Costs 2

A sanction hearing on whether to impose sanctions for filing a groundless pleading in bad faith or for purposes of harassment need not involve a finding of contempt. Vernon's Ann. Texas Rules Civ. Proc., Rule 13.

[8] Contempt 2

A party who files a groundless pleading in bad faith or for the purpose of harassment is subject to a range of punishments, one of which is a finding of contempt. Vernon's Ann. Texas Rules Civ.Proc., Rules 13, 215.2 subd.b.

[9] Appeal and Error 984(1)

Finding that attorney filed groundless pleadings in bad faith was a civil matter, and thus, $100,000 sanction against attorney was a civil sanction, requiring review for abuse of discretion. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[10] Attorney and Client 24

By making no findings that attorney filed a fictitious suit or fictitious pleadings as an experiment to get an opinion of the court or that he knowingly made false statements in pleadings for the purpose of securing a delay of the trial of the cause, the trial court at sanction hearing was not required to hold attorney in contempt before imposing sanctions. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[11] Jury 28(6)

By never requesting a jury for the sanctions proceeding and failing to object to court's role as fact-finder at sanctions hearing, attorney who was assessed $100,000 in sanctions for filing groundless pleadings in bad faith waived right to jury, even though jury demand was made in the underlying trial, where he was not a party in underlying trial. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[12] Constitutional Law 303

Attorney's sanctions hearing was a civil proceeding, and thus, notice of the date of the sanctions hearing and notice that procedural rule governing the filing of groundless pleadings was the basis for potential sanctions provided him with adequate notice consistent with due process. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[13] Double Jeopardy 139.1

[13] Double Jeopardy 152

Attorney was not punished twice for the same offense in violation of constitutional proscription against double jeopardy when attorney was sanctioned for pre-trial conduct of filing groundless pleadings in bad faith after being twice held in contempt for his conduct during the underlying trial; sanctions proceeding dealt with actions attorney took before trial, and trial judge specifically noted in sanction order that attorney's actions during and after trial were not sanctionable, but merely indicative of attorney's bad faith intent prior to trial in filing groundless pleadings. U.S.C.A. Const.Amend. 5; Vernon's Am.Texas Rules Civ.Proc. Rule 13.

[14] Constitutional Law 251

Federal and state constitutional due process provisions are identical. U.S.C.A Const.Amend. 5; Vernon's Ann.Texas Const. Art. 1, § 13.

[15] Double Jeopardy 1.

[15] Double Jeopardy 132.1

The double jeopardy clause of the Fifth Amendment prohibits: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.

[16] Double Jeopardy 27

The double jeopardy does not bar the use of evidence from one offense to establish intent in a separate offense. U.S.C.A. Const.Amend. 5.

[17] Appeal and Error 1024.1

A sanction order, imposing sanctions for filing a groundless pleading in bad faith or for the purpose of harassment, must be upheld if any of the facts set forth by the court supports the sanctions. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[18] Costs 2

"Groundless," as term is used to impose sanctions for groundless pleadings, is defined as (1) no basis in law or fact, and (2) not warranted by good faith argument for the extension, modification, or reversal of existing law. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[19] Attorney and Client 24

Argument that mental health professionals owe a duty to the parent not to negligently misdiagnose a child patient's condition was not a good faith argument for extension or change of existing law, as required to avoid sanctions against attorney for filing a groundless pleading; even assuming claim of negligent misdiagnosis had a good faith legal basis, the facts precluded actionable negligence, considering that child's disturbing behavior provided ample evidence to professionals that client's son had been sexually molested and that client was implicated. Vernon's Am. Texas Rules Civ.Proc., Rule 13.

[20] Attorney and Client 24

Action for negligent infliction of emotional distress was groundless, as required to impose sanctions on attorney for filing action on behalf of his client, even is attorney could not have known at time of pleadings that state Supreme Court would reverse a court of appeals' opinion recognizing such a

claim, where attorney failed to introduce any evidence of outrageous conduct. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[21] Damages 49.10

[21] Damages 50.01

Outrageous conduct is a necessary element of claims for both negligent and intentional infliction of emotional distress.

[22] Attorney and Client 24

Cause of action against client's wife's attorney for representing her in divorce action against client was groundless, are required to impose sanctions on attorney for filing action on behalf of his client, where there were many cases predating the pleadings that stood for proposition that there existed no cause of action against an opposing attorney for representing a client in a judicial proceeding. Vernon's Ann. Texas Rules Civ.Proc., Rule 13.

[23] Conspiracy 2

[23] Conspiracy 19

An agreement in a conspiracy may be tacit and informal, and a civil conspiracy can by established by circumstantial evidence.

[24] Attorney and Client 24

Cause of action for civil conspiracy against client's wife, her counsel in divorce action, and several agencies was groundless, as required to impose sanctions on attorney for filing action on behalf of his client, even assuming there was evidence of his client, even assuming there was evidence of a tacit agreement

between the defendants, where no actionable underlying tort action was pleaded. Vernon's Ann. Texas Rules Civ.Proc., Rule 13.

[25] Conspiracy 1.1

Conspiracy is not an independent, actionable claim.

[26] Attorney and Client 24

Attorney's unsupported assertions that he could have proven that his client had standing to pursue an action under Racketeer Influenced Corrupt Organizations Act (RICO) if he had not been prevented from exploring certain unidentified evidence at trial did not amount to a good faith argument that client was injured in his business or property by any predicate act of racketeering activity, and thus, RICO action against client's former wife, her counsel in divorce action, and several agencies was groundless, as required to impose sanctions on attorney for filing action. Vernon's Ann. Texas Rules Civ. Proc., Rule 13; 18 U.S.C.A. § 1961 et seq.

[27] Appeal and Error 837(11)

In considering whether a claim is groundless within the meaning of rule permitting sanctions for filing a groundless pleading in bad faith or for the purpose of harassment, the Court of Appeals will examine inadmissible evidence.

[28] Attorney and Client 24

That attorney personally sued opposing parties, their counsel, and court personnel following directed verdict against his client in an underlying suit was sufficient evidence of attorney's bad faith and intent to harass, prior trial of that underlying suit, to warrant sanctions against attorney for filing groundless

pleadings on behalf of client against same defendants, considering that attorney failed to make any reasonable inquiry to determine whether defendants did the acts alleged before signing pleadings. Vernon's Ann. Texas Rules Civ.Proc., Rule 13.

[29] Attorney and Client 24

Attorney was responsible for each groundless pleading, brought in bad faith or to harass the defendants, filed on behalf of client, and thus, imposition of $100,00 in sanctions was warranted, and even disproportionately small, where defendants' fees and expenses after client signed a false affidavit opposing defendants' motion for summary judgment totaled nearly $1 million.

[30] Costs 2

A party may be subject to a smaller subsection of sanctionable conduct for filing a groundless pleading in bad faith or for the purpose of harassment than his attorney; the party must be implicated for his unique conduct separate from the attorney's representation, while the attorney may be generally liable for each groundless pleading. Vernon's Ann. Texas Rules Civ.Proc., Rule 13.

[31] Costs 2

A sanction order must state with particularity good cause for finding that pleadings were groundless and not brought in good faith or groundless and brought for purposes of harassment, or else there is abuse of discretion. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

[32] Appeal and Error 1071.6

A trial court's failure to make particular findings in a sanction order for filing a groundless pleading in bad faith or for purposes of harassment may constitute harmless error when the trial court's findings of fact and conclusions of law supply the particulars of good cause required by under the rule governing such sanctions. Vernon's Ann.Texas Rules Civ.Proc., Rule 13.

*759 Paul E. Nunu, Houston, for Appellant.

John B. Wallace, Joy M. Soloway, Nancy J. Locke, J. Preston Wrotenbery, Kevin D. Jewell, Earle S. Lilly, Donald M. Hudgins *760 Alfred C. Koenig, Joel A. Nass, Jim Barker, Houston, for Appellees.

Panel consists of Justices COHEN, NUCHIA, and DUGGAN. [FN*]

FN* The Honorable Lee Duggan, Jr., retired justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

OPINION

LEE DUGGAN, Jr., Justice (Retired).

Appellant, L.T. "Butch" Bradt, appeals a Rule 13 sanction order and its levy of a $100,000 fine, asserting six point of error. We affirm.

Background

This appeal is the culmination of litigation originally filed in federal district court in 1989 by Mark Metzger against his former wife, her attorney, and various agencies and individuals (collectively, the "defendants"). The suit asserted various

theories of state liability, as well as federal claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C.A. § 1961-1968 (1984 & Supp. 1999)) and a civil rights statute. The federal district court dismissed Metzger's federal claims and abstained from exercising jurisdiction over his pendent state law claims. Metzger refiled his claims in state court. [FN] In 1992, following a month of trial and a directed verdict in favor of the defendants, the trial court assessed sanctions of $994,000 plus interest against Metzger and each of his attorneys. See Metzger v. Sebek, 892 S.W.2d 20, 50 (Tex. App.--Houston [1st Dist.] 1994, writ denied). Appellant was one of Metzger's attorneys.

FNI. As of the time of trial, Metzger's claims were for:

(1) civil conspiracy;
(2) civil conspiracy to extort from and defraud him of property and liberty interests protected by the Texas and United States Constitutions;
(3) malicious prosecution;
(4) "deprivation of civil rights based upon malicious prosecution",
(5) intentional infliction of emotional distress;
(6) medical negligence (asserted only against appellees Depelchin Children's Center, Baylor College of Medicine, Ernest Kendrick, Luisa Maria Acevedo Lohner, Michael D. Cox, and Barbara Taylor);
(7) negligent infliction of emotional distress (asserted only against Depelchine, Baylor, Kendrick, Lohner, Cox, and Taylor); and
(8) civil RICO
Bradt v. West, 892 S.W.2d 56, 61,62 (Tex.App.—Houston [1st Dist.] 1994, writ denied).

On appeal, this Court affirmed the directed verdict and concluded that the defendants had proved their right to sanctions against Metzger, but that the trial court had awarded an excessive amount of sanctions. Id. at 48, 53. We also reversed and remanded the award of sanctions against appellant because his motion to recuse the trial judge, the Honorable David West, had been filed timely. Id. at 49-50. On remand, after Judge West voluntarily recused himself, the Honorable Scott Brister held a hearing, in accordance with our instructions, to determine (1) the amount of sanctions to be awarded against Metzger, (2) whether appellant violated Texas Rule of Civil Procedure 13, and if so, (3) the appropriate amount of sanctions to be assessed against him. Following the hearing, Judge Brister issued an April 8, 1996 written sanction order ("Sanction Order"), determining that appellant had violated Rule 13 and ordering appellant and Metzger each to pay $100,00 to the defendants (appellees in this appeal). Metzger did not appeal the Sanctions Order.

In appealing from the Sanctions Order, appellant raises six points of error.

II.
Standard of Review

[1][2][3] This Court reviews a trial court's Rule 13 sanction order under an discretion standard, Laub v. Pesikoff, 979 S.W.2d 686, 693 (Tex.App.--Houston [1st Dist.] 1998, pet. denied). Our test for abuse of discretion is deferential to the trial court--whether the court acted without reference to any guiding rules and principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985). Therefore, "[i]t is not necessarily an abuse of a trial court's discretion if under the same facts we would decide the matter differently, or if the court committed a mere error in judgment." Tarrant County v. Chancey, 942 S.W.2d 151, 154 (Tex. App.—Fort Worth 1997,

no writ). Moreover, the trial court's discretion is limited only by the requirement that its order be just and that the sanction imposed be directly related to the harm done by the sanctioned conduct. Ray v. Beene, 721 S.W.2d 876, 879 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

III.
Discussion

A. Point No. 1: Whether the trial court used the wrong burden of proof in determining whether to impose a punitive fine against appellant.

Appellant argues in his first point of error that Judge Brister abused his discretion when he failed to apply a "beyond a reasonable doubt" standard in his Rule 13 hearing. He argues that, although Judge Brister specifically declined to hold him liable for criminal contempt, the proceedings against him "were in the nature of criminal contempt proceedings since he was being tried (and punished) for past behavior."

Texas Rule of Civil Procedure 13 provides:

> The signature of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule,

> the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215.2(b), upon the person who signed it, a represented party, or both.
> Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

TEX. R.CIV.P. 13 (emphasis added). According to appellant, the underscored language of the first paragraph's second sentence, "shall be held guilty of a contempt," indicated that Rule 13 proceedings are always quasi-criminal contempt proceedings imposing criminal punishment for past behavior and, therefore, requiring criminal law constitutional standards and protections. He further points out that Rule 215-2b also authorizes contempt, among other sanctions. See TEX. R. CIV. P. 215.2(b).

Appellees respond that appellant's $100,000 fine was compensatory in nature and not a criminal punishment for past behavior, that Judge Brister specifically limited the sanction hearing to potential civil sanction against appellant, and that he declined to conduct a contempt proceeding.

[4][5][6] Well settled principles guide the interpretation of Rule 13. Texas courts apply the same rules of construction to rules of procedure as to statutes. In re VanDeWater, 966 S.W.2d 730, 732 (Tex.App.—San Antonio 1998, no. pet.); Burrhus v. M & S Supply, Inc. 933 S.W.2d 635, 640 (Tex.

Ann.— San Antonio 1996, writ denied). When a rule of procedure is clear, unambiguous, and specific, we construe its language according to its literal meaning. Murphy v. Friendswood Dev. Co., 965 S.W.2d 708, 709 (Tex. App. — Houston [1st Dist.] 1998, no pet.) (interpreting Rule 13). We avoid constructions giving rise to constitutional infirmities. TEX GOV'T CODE ANN. 311.021(1) (Vernon 1997). Finally, we note that rule interpretation is "a pure question of law over which the judge has no discretion. " Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436, 437 (Tex. 1997).

[7] Applying these standards, it is clear that a Rule 13 sanction hearing need not involve a finding of contempt. The rule's first sentence generally addresses responsibility for instruments that are groundless and brought either in bad faith or for the purpose of harassment. Rule 13's second sentence addresses particularly egregious actions involving written pleadings, actions that rulemakers have determined must be dealt with as contemptuous conduct--(1) filing fictitious suits or pleadings to experiment or obtain court opinions or (2) making knowingly groundless and false pleadings in order to secure trial delays.

Rule 13's third sentence provides for "an appropriate sanction" under Rule 215.2(b). Because contempt has already been mandated for all instances of conduct described in the second sentence, the sanctions "available under Rule 215.1b)" apply to the remaining proscribed conduct, namely, that set out in Rule 13's first sentence.

[8] Reading sentences one and three together, a party who files a groundless pleading in bad faith or for the purpose of harassment is subject to a range of punishments under 215.2(b), one of which is a finding of contempt. Thus, the trial court can choose among a range of sanctions.

[9][10] Here, Judge Brister explicitly declines to consider a contempt sanction, as he might have done under Rule 215.2(b). Neither did he find, under the proscribed conduct of Rule 13's second sentence, that Metzger or appellant filed a fictitious suit or fictitious pleadings "as a experiment to get an opinion of the court" or knowingly made false statement in pleadings "for the purpose of securing a delay of the trial of the cause." Instead, Judge Brister found more generally under Rule 13's first sentence that Metzger and appellant filed groundless pleadings in bad faith, and chose from the discretionary range of punishments available under 215.2(b) (excluding a possible contempt sanction, which he refused to consider). Because Judge Brister did not make the findings envisioned in Rule 13's second sentence, he was not required to hold appellant in contempt. Rather than decide now whether a finding of contempt under Rule 13 would require a criminal standard of review and implicate the constitutional or procedural rights applicable to criminal proceedings, we simple hold that Judge Brister's general finding that appellant filed a groundless pleading in violation of Rule 13 is, under this record, a civil matter.

The standard of review of a trial court's imposition of a civil sanction under Rule 13 is clear—we review the trial court's decision for abuse of discretion. See Laub, 979 S.W.2d at 693. Therefore, our inquiry will turn on whether the Sanction Order is arbitrary or unreasonable.

Appellant's first point of error is overruled.

B. Point No. 2: Whether appellant was entitled to a jury trial on the assessment of punitive fines.

[11] Appellant argues in his second point of error that he was entitled to a jury trial on the assessment of punitive fines.

[11] Appellant argues in his second point of error that he was entitled to a jury trial on the assessment of his Rule 13 sanction because his $100,000 fine is a "serious offense" implicating a constitutional Sixth Amendment right to a jury trial. The record reflects, however, that appellant never requested a jury for the sanctions proceeding. Appellant concedes that he did not request a jury trial on the issue of Rule 13 sanctions, but argues that he was entitled to rely on the initial jury demand in the underlying trial. But appellant was not a party in the underlying trial, and, in any event, he failed to object to the trial court's role as fact finder at his sanctions hearing. Therefore, appellant's second point of error is waived. See generally Rodriguez v. Texas Dept. of Mental Health and Mental Retardation, 942 S.W.2d 53, 56 (Tex.App.—Corpus Christi 1997, no writ) (holding that a party waive his right to a jury trial by failing to object when the trial court undertakes to try the case before the bench). [FN2]

> FN2. Further, this Court has already determined that "[t]here is no right to a trial by jury on the issue of whether rule 13 has been violated." Neely v. Commission for Lawyer Discipline, 976 S.W.2d 824, 827 (Tex. App.— Houston [1st Dist.] 1998, no pet.); see also Brantley v. Etter, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam) (rejecting the proposition that "one complaining of the award of attorney's fees as sanctions has the right to a jury trial to determine the amount of such attorney's fees" and holding that "the amount of attorney's fees awarded as sanctions for discovery abuse is solely within the sound discretion of the trial judge, only to be set aside upon a showing of clear abuse of that discretion").

Appellant's second point of error is overruled.

C. Point No. 3: Whether appellant was denied due process when the court declined to hear his special exceptions.

[12] Appellant next argues that he was denied due process of law because the defendants'/appellees' motions for sanctions were not sufficiently specific and Judge Brister refused to consider his "Special Exceptions and Motion for Specifics of Complaint. He argues that he was entitled to "full and complete notice of the subject matter and ...when, how, and by what means [he] has been guilty of the alleged defect," citing Ex parte Edgerly, 441 S.W.2d 514, 516 (Tex. 1969). Appellant also asserts that he was entitled to reasonable notice of each alleged contemptuous act, citing Ex parte Brister, 801 S.W.2d 833 (Tex. 1990). These and other cases appellant cites, however, arise in the context of criminal contempt proceedings.

Because appellant's Rule 13 hearing was a civil proceeding, his non-Rule 13 contempt cases are inapposite. He cites no cases holding that adequate notice for a Rule 13 hearing requires anything more than (1) notice of the date of the hearing and (2) notice that Rule 13 is the basis for potential sanctions. Texas case law tracks Federal Rule of Civil Procedure 11, and notice under that rule is satisfied when a party is put on notice that the opposing party will seek, and the trial court may impose, Rule 11 sanctions. See Monroe v. Grider, 884 S.W.2d 811, 817 (Texas App.—Dallas 1994. writ denied) (Texas courts "look to cases interpreting Federal rule 11 to interpret rule 13"); Merriman v. Security Ins. Co. of Hartford, 100 F.3d 1187, 1191 (5th Cir. 1996) (finding that the other party's series of letters, ultimata, and motions put [appellant] on notice that [the other party] would seek, and the district court might impose, Rule 11 sanctions").

We find that appellant was adequately apprised of the date of his Rule 13 sanctions hearing and that he would be potentially liable under Rule 13 for any pleadings that were groundless or filed in bad faith.

Appellant's third point of error is overruled.

D. Point No. 4: Whether the trial court's sanctions violate double jeopardy protections of the Texas and United States constitutions.

[13] Appellant argues that he was subjected to constitutionally impermissible double jeopardy because he was subjected to a Rule 13 sanction after he was twice held in contempt for his conduct in the underlying trial.

[14][15] Federal and state constitutional due process provisions are identical. Phillips v. State 7878 S.w.2d 391, 393 n. 2 (Tex. Crim.App. 1990); Gongora v. State, 916 S.W.2d 570, 576 (Tex. App.— Houston [1st Dist.] 1996, pet. ref'd). The double jeopardy clause of the fifth amendment prohibits:

> (1) a second prosecution for the same offense after acquittal;
> (2) a second prosecution for the same offense after conviction; and
> (3) multiple punishments for the same offense.

Id at 576.

Here, appellant contends he was entitled to double jeopardy protection under state and federal law because "the sanctions proceeding had many of the aspects of a criminal contempt proceeding and [appellant] could have been punished by incarceration, had Judge Brister chosen to do so." His argument is that, because he was held in contempt for his conduct at trial

and was subsequently sanctioned under Rule 13, he was punished more than once for the same criminal offense.

[16] We disagree. While appellant was held in contempt earlier for his conduct during trial, this Rule 13 proceeding dealt with actions he took before trial. Judge Brister specifically noted in several parts of the Sanction Order that appellant's actions during and after trial were not sanctionable, but merely indicative of appellant's bad faith intent prior to trial in filing groundless pleadings for Metzger. The Double Jeopardy Clause does not bar the use of evidence from one offense to establish intent in a separate offense. United States v. Felix, 503 U.S. 378, 386-87, 112 S.Ct. 1377, 1382-83, 118 L.Ed.2d 25 (1992). Appellant is not being punished more than once for the same offense; his fourth point of error is overruled.

E. Point No. 5: Whether the trial court abused its discretion in imposing Rule 13 sanctions against appellant.

[17] Appellant contends that Judge Brister abused his discretion in assessing Rule 13 sanctions against him. As an initial matter, appellant argues, without citing any authority, that this Court should employ a directed verdict standard to review the facts available to him when he signed various pleadings for his client in the underlying trial. Under a directed verdict standard, we would "view the evidence in the light most favorable to the party against whom the verdict was rendered and disregard all contrary evidence and inferences." Qantel Bus. Sys. v. Custom Controls Co., 761 S.W.2d 302, 303 (Tex. 1988). As discussed earlier, however, we review Rule 13 sanctions for abuse of discretion; appellant is urging the wrong standard of review. He also attacks the trial court's findings on the apparent theory that the order should be overturned if some of the factual findings of the court were in error. However, a trial court's Rule 13 Sanction Order must be upheld if any of the facts set forth by the court supports the sanctions. See, e.g. Monroe, 884 S.W.2d

at 816 n. 3, 819 (Tex. App.— Dallas 1994, writ denied) (upholding sanctions when five of seven fact findings supported the sanctions); New York Underwriters Ins. Co. v. State Farm Mut. Auto, Ins. Co., 856 S.W.2d 194, 205 (Tex. App.— Dallas 1993, no writ) (judgment imposing sanctions will be upheld" on any applicable theory that finds support in the record").

Rather than undertake to refute appellant's contentions on a point-by-point basis, we instead address those findings that support a Rule 13 sanction.

1. Whether appellant's claims are groundless.
Appellant was the attorney of record for Metzger's second, third, fourth, and fifth amended petitions and for Metzger's response to the defendants' motion for summary judgment. Thus, under Rule 13's first and third sentences, appellant is subject to sanctions for pleadings he signed on Metzger's behalf if those pleadings are groundless and he signed them in bad faith. TEX. R. CIV. P. 13.

[18] Rule 13's second paragraph defines "groundless" as
(1) "no basis in law or fact"; and
(2) "not warranted by good faith argument for the extension, modification, or reversal of existing law."

Id. Before Judge Brister was directed to conduct this sanction dispute, this Court had already conclusively determined that none of Metzger's claims, as appellant articulated them, had a basis in law or fact. [FN3] The only issue properly before Judge Brister with respect to the groundlessness of the pleadings appellant filed for Metzger was whether there was a "good faith argument for the extension, modification, or reversal of existing law" when appellant signed the pleadings.

FN3. Specifically, we concluded in the appeal from the underlying judgment that Judge West's directed verdict

> on all of the client Metzger's claims was proper "because (1) some were not viable to begin with, and (2) there was no evidence to support the ones that were viable." Bradt, 892 S.W.2d at 64 (summarizing the Court's analysis of claims in Metzger v. Sebek, 892 S.W.2d 20 (Tex.App.— Houston [1st Dist.] 1994, writ denied)). Furthermore, we determined there was "abundant evidence" of probable cause against Metzger, which obviated his malicious prosecution claim, and held that each of Metzger's conspiracy claims was unproved after more than a month of trial. Metzger, 892 S.W.2d at 43-47. Our opinion also affirmed Judge West's ruling dismissing Metzger's RICO claim and held that Metzger had failed to prove an essential element of his infliction of emotion distress claim. Id. at 47-48. Judge Brister expressly took judicial notice of the findings of this Court in the Sanction Order.

Appellant's following arguments could be construed as attempts to articulate a good faith argument for the extension or change of law existing at the time he drafted Metzger's pleadings.

> a. The duty of mental health professionals to the parents of patients for negligent misdiagnosis.

[19] Appellant argues that, at the time he filed Metzger's pleadings, he made a good faith argument in asserting that mental health professionals owe a duty to the parent not to negligently misdiagnose a child patient's condition. He cites W.C.W. v. Bird, 840 S.W.2d 50, 56 (Tex.App.— Houston [1st Dist.] 1992), rev'd, 868 S.W.2d 767 (Tex. 1994), and James v. Brown, 637 S.W.2d 914, 916-18 (Tex. 1882). Assuming appellant's claim of negligent misdiagnosis had a good faith legal basis, however, Judge Brister found that a cursory investigation of the facts would have revealed that Metzger could not show actionable negligence. We noted in our previous opinion that

ample evidence gave probable cause to the professionals examining Metzger's son that the boy had been sexually molested and that Metzger was implicated. [FN4] The child's bizarre and disturbing behavior, detailed in our previous opinion, was fatal to a good faith allegation that any of the defendants breached a duty by negligently misdiagnosing Metzger's son.

> FN4. Specifically, this Court found that "Metzger was strongly implicated in the sexual abuse of [his son] by (1) court appointed psychologist] Guez, after observing and evaluating [Metzger's son]; (2) [his former wife] Sebek after speaking with [Metzger's son]; and (3) [the son] himself, who implicated him on several occasions." Metzger, 892 S.W.2d at 43.

b. Negligent infliction of emotional distress.

[20][21] Judge Brister cited Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993), for the proposition that negligent infliction of emotion distress is not recognized in Texas. Appellant points out that the court of appeals opinion in Boyles had recognized such a claim and argues that he could not have known that the Texas Supreme Court would overrule Boyles in 1993. However, outrageous conduct is a necessary element of claims for both negligent and intentional infliction of emotional distress. Massey v. Massey, 807 S.W.2d 391, 399 (Tex.App.—Houston [1st Dist.] 1991). writ denied per curiam, 867 S.W.2d 766 (Tex. 1993). After more than a month in trial to prove outrageous conduct, appellant failed to provide any evidence of this essential element of Metzger's claim. Metzger, 892 S.W.2d at 39, 48. Therefore, appellant has not articulated a good faith basis for such a claim under these facts.

c. Cause of action against opposing counsel for representing opposing party in a judicial proceeding.

[22] Judge Brister cited Bradt v. West, 892 S.W.2d 56, 71-72 (Tex.App.— Houston [1st Dist.] 1994, writ denied), for the proposition that a party has no cause of action against opposing counsel for representing an opposing party. Appellant contends Bradt's holding on this subject was limited to the conclusion that an attorney has no cause of action against an opposing party's attorney and that it was Metzger, the client, who sued opposing counsel. Additionally, appellant complains that Bradt was decided after Metzger's pleadings were filed.

However, Judge Brister cited Bradt v. West for its discussion of cases supporting the proposition that there is no cause of action against opposing counsel for representing a client in a judicial proceeding, and those cases predate appellant's pleadings. See id. at 71. Appellant had before him ample precedent to recognize that Texas case law frown on suing opposing counsel simple for representing a party in a judicial proceeding. See, e.g., Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App. — Austin 1966, writ ref'd n.r.e.): accord Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ). Appellant has provided no relevant authorities in support of this cause of action.

d. Cause of action for torticus conspiracy.

[23] Judge Brister found that many of the alleged conspirators had never met each other, much less participated in regular meetings or communications in furtherance of a conspiracy. Appellant cites cases stating the undisputed proposition that an agreement may be informal and tacit and that a civil conspiracy can be established by circumstantial evidence. See, e.g., International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 581-82 (Tex. 1963); Bourland v. State, 528 S.W.2d 350, 354-55 (Tex. Civ.App. — Austin 1975, writ ref'd n.r.e.) Judge Brister's finding, however, turned on the complete lack of

evidence to support appellant's allegations of conspiracy. Appellant's cases do not support a good faith extension of the law to impose liability on unrelated parties who are not in agreement with each other.

[24][25] Additionally, conspiracy is not an independent, actionable claim. As the Texas Supreme Court has observed:

> Civil conspiracy, generally defined as a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means, might be called a derivative tort... That is, a defendant's liability for conspiracy depends on participation is some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.

Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996). Therefore, even if he had been able to show some sort of tacit agreement between the defendants, appellant's inability to articulate even one actionable underlying tort claim is fatal to his conspiracy allegations. See, e.g., Hoggett v. Brown, 971 S.W.2d 472, 493 (Tex. Houston [14th Dist.] 1997, pet. denied) (concluding there was no actionable conspiracy claim once the court had determined the defendants did not owe a fiduciary duty to the plaintiff because "a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of named defendants liable").

e. Standing to assert RICO claim.

[26] Judge Brister found the RICO claim was groundless because Metzger lacked standing. Appellant summarily states

that Metzger had standing to assert a RICO claim because the defendants billed his insurance carrier and Metzger personally paid bills that were incurred, pursuant to an ongoing criminal enterprise. Appellant also argues the bills Metzger's insurance company paid constitute injury to Metzger. We earlier expressly determined, however, that Metzger lacked standing because he failed to show in the "record that he was injured in his business or property by any predicate act of racketeering activity." Metzger, 892 S.W.2d at 47. It was this failure to establish any underlying, predicate racketeering activity that was fatal to the issue of standing.

[27] Appellant also mentions evidence related to a Medicare Fraud Control Unit Report (without citing to the record) that he claims would have supported his allegations of a criminal enterprise, had Judge West not prevented him from exploring the issue. In considering whether a claim is groundless within the meaning of Rule 13, we do examine inadmissible evidence. See, e.g., Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 637 (Tex. 1989). Nevertheless, appellant does not establish a good faith basis to argue that Metzger had standing to pursue a RICO claim by making unsupported assertions on appeal that he was prevented from exploring unidentified evidence that he summarily claims might have shown racketeering activity by the defendants.

For all the reasons discussed above, Metzger failed to establish a good faith basis for changing the underlying law. Therefore, we find that Judge Brister did not abuse his discretion in determining that all of the claims articulated by appellant for Metzger are groundless.

2. Whether appellant brought his pleadings in bad faith.

[28] Because Judge Brister's order did not err in finding that appellant's pleadings were groundless, Rule 13 sanctions are warranted if the pleadings were asserted in bad faith or for the purpose of harassment.

Judge Brister made numerous persuasive findings of bad faith. First, he noted that appellant personally sued the defendants, their attorneys and insurers, and court personnel, following Judge West's directed verdict in the underlying trial. [FN5] Judge Brister noted that, although this subsequent spate of litigation was not sanctionable in the dispute before him concerning appellant's pre-trial conduct it was evidence of bad faith. Judge Brister also observed that, as of the time of the underlying trial, appellant had failed to take the deposition of even one of the defendants. Judge Brister found that (1) even a cursory inquiry would have revealed that the defendants had not met or communicated in furtherance of a conspiracy; (2) that the term "rule out" (as used in reference to the possibility that Metzger's son had been sexually abused) was not exculpatory, as appellant had maintained through the time of Judge Brister's Rule 13 sanction hearing, but rather meant that a possible diagnosis of sexual abuse should be considered; and (3) that Defendant Cox, who was sued for allegedly implicating Metzger before a grand jury in the sexual abuse of his son, had actually testified to the contrary—that Metzger's conduct was inconsistent with that of a sex offender.

FN5. The Sanction Order states that appellant brought two actions following the directed verdict—first in federal court and then a subsequent suit in state court. In fact, appellant personally brought suit only in state court against Judge West, the defendants, their attorneys, and insurers, and the contempt prosecutor.

> See Bradt, 892 S.W.2d at 65. In federal court, however, appellant brought suit on behalf of Metzger against the defendants, Metzger's former wife, and the prosecutor who prosecuted Judge West's contempt charge. Id. at 64. Nevertheless, any error in this misstatement is harmless. The overarching fact of importance is that appellant personally sued the other parties, their counsel, and the court personnel. Under these facts, Judge Brister did not abuse his discretion in finding this behavior indicative of appellant's bad faith and intent to harass in filing Metzger's pleadings prior to trial.

As discussed earlier, appellant alleges (without citing to the record) that he could have proved a conspiracy if he had been allowed to pursue excluded evidence. Nevertheless, the record clearly reflects appellant failed to show any evidence of a conspiracy. Moreover, he does not substantively contest his misunderstanding at trial of either the term "rule out" or the relatively favorable testimony of Defendant Cox. [FN6] Judge Brister had ample basis to find that the pleadings appellant signed were not made after reasonable inquiry, as required by Rule 13.

> FN6. Appellant continues to suggest, without explanation, that he fairly characterized Defendant Cox's testimony as unfavorable to Metzger. But under questioning at his Rule 13 hearing before Judge Brister, appellant failed to provide a single instance in which the record reflected Cox gave testimony that would constitute a basis for a cause of action.

Judge Brister found that, as a consistent pattern of conduct, appellant violated Judge West's motion in limine. Judge Brister noted our finding in Metzger that "Metzger's attorneys repeatedly violated the order in limine; violated other orders of

the court; interrupted the judge; grumbled audibly about rulings; [and] laughed at the judge." Metzger, 892 S.W.2d at 39. However, Judge Brister expressly noted that this conduct was not itself sanctionable in the Rule 13 dispute before him, but rather evinced appellant's bad faith prior to trial in filing Metzger's pleadings.

Judge Brister also found that the allegations of a vast conspiracy, the evidence that none of the defendants had accused Metzger of sexual abuse or sought his indictment, and the surrounding context of Metzger's divorce and child custody proceeding all should have alerted appellant that Metzger's motivation was to exact revenge against his former wife and others who got involved in their dispute. Finally, Judge Brister found that the large number of defendants (whom appellant barely investigated to determine whether they actually did any of the acts alleged) and the protracted trial proceedings, which lasted for more than a month, based in part on appellant's elicitation of often irrelevant information, all indicated that appellant's purpose in filing suit was to harass the defendants.

Appellant has provided this court with no valid argument or authority to show that Judge Brister abused his discretion in concluding that appellant's intent was to abuse or harass the defendants in bad faith with frivolous claims.

3. Whether the $100,000 sanction was proportionate to the harm.

[29] Having concluded that Judge Brister did not abuse his discretion in determining that the pleadings signed by appellant were groundless and brought in bad faith or to harass the defendants, the only issues remaining are (1) whether the $100,000 sanction imposed is directly related to the offensive

conduct and (2) whether the amount is excessive. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

Appellant was the attorney of record on Metzger's second, third, fourth, and fifth amended petitions in state court, yet failed to nonsuit even one defendant or drop any of Metzger's groundless claims. Judge Brister's order found (and appellant does contest) that defendants' fees and expenses after Metzger signed a false affidavit opposing the defendants' motion for summary judgment (which alone accounts for the fact that Metzger's claims proceeded to trial) totaled nearly one million dollars. Appellant should have known early on that Metzger's claims were groundless. Metzger's untenable claims resulted in approximately ten times more expense to the defendants than appellant was fined. Thus, appellant and Metzger were each fined only a fraction of the cost they forced the defendants to incur.

[30] If anything, appellant's sanction was disproportionately small. In our previous opinion, we reversed Metzger's sanction because we deemed it excessive that Metzger, who is not an attorney, should be made to bear the full expense of the defendants' costs incurred because of his one independently sanctionable act, i.e. the signing of an affidavit containing intentionally false information. Rather, we determined that Metzger should be fined a smaller amount because he was responsible under Rule 13 only for his individual affidavit, not the pleadings as a whole. See Metzger, 892 S.W.2d at 52-54. In particular, we noted that "in assessing sanctions for violating rule 13, a party should not be punished for its counsel's conduct 'unless the party is implicated apart from having entrusted its legal representation to council,'" Id. at 51 (quoting from Glass' v. Glass, 826 S.W.2d 683, 687 (Tex.App.— Texarkana 1992, writ denied)). Thus, a party may be subject to a smaller subsection of sanctionable conduct under Rule 13 than his

attorney; the party must be implicated for his unique conduct separate from the attorney's representation, while the attorney may be generally liable for each groundless pleading.

Here, where all of the pleadings appellant filed on Metzger's behalf are groundless, appellant was responsible for each such pleading, while Metzger was independently at fault only for signing an affidavit for which he intentionally supplied false information.

We previously reversed the sanction against appellant solely because of his motion to recuse Judge West. See id at 49-50. Appellant, an experienced attorney, should have known that Metzger's pleadings were groundless as a matter of law. Judge Brister temperately--indeed, charitably--sanctioned appellant for no more that the amount Metzger was sanctioned, approximately ten percent of the costs incurred by the defendants after Metzger's false pre-trial affidavit that defeated the defendants' motion for summary judgment.

Appellant's fine was, therefore, directly related to his abusive pleading practices and was by no measure disproportionately large to the harm appellant inflicted.

The Sanction Order specifically attributes the waste of time and money incurred by the defendants to appellant's frivolous pleadings.

The trial court did not abuse its discretion in assessing a $100,000 fine against appellant.

Appellant's fifth point of error is overruled.

F. Point No. 6: Whether the trial court's Sanction Order is void for lack of particularity.

[31] Appellant argues that Judge Brister's Sanction Order fails for lack of specificity. A Rule 13 sanction order must state with particularity "good cause for finding that [appellant's] pleadings were groundless and not brought in good faith or groundless and not brought in good faith or groundless and brought for purposes of harassment," or else there is abuse of discretion. Johnson v. Smith, 857 S.W.2d 612, 617 (Tex.App.— Houston [1st Dist.] 1993, no writ).

[32] Appellant's argument appears to be that if any finding of the trial court was in error, the entire order is void. "[A] trial court's failure to make particular findings in a rule 13 order may constitute harmless error when the trial court's findin *770 of fact and conclusions of law supple the particulars of good cause required by rule 13." Gorman v. Gorman 966 S.W.2d 858, 867-68 (Tex.App.— Houston [1st Dist] 1998, pet. denied). Here, Judge Brister expressly took judicial notice of this Court's determination that all of appellant's arguments were flawed "because (1) some were not viable to begin with, and (2) there was no evidence to support the ones that were viable." Bradt, 892 S.W.2d at 64. The Sanction Order independently set out factual findings and conclusions of law regarding the claims.

In assessing the sanctions, Judge Brister specifically noted, among other findings, that "appellant was informed of the obvious legal impediments to Plaintiff's claims, knew of the questionable evidence contrary to those claims, [and] took a shotgun approach to joining parties without further consideration." Appellant argues at one point, however, that Judge Brister erred in finding that he frivolously joined "parties," when appellant joined only one party. Any alleged error from this factual finding is harmless; the Sanction Order adequately sets out with particularity factual findings that adequately provide good cause for sanctioning appellant for attorney's fees. See, e.g., Gorman, 966 S.W.2d at 867-68. [FN7]

FN7. In any case, it is undisputed that appellant filed the second, third, fourth, and fifth amended petitions in state court, and responded to the defendants' motion for summary judgment, without nonsuiting the many defendants who fell within the ambit of Metzger's allegations.

The defendants on appeal have requested that we also sanction appellant for frivolously filing this appeal. Although appellant's pleadings in the court below on Metzger's behalf were indeed groundless, appellant has urged several issues that at least colorable, though not warranting reversal. Under these facts, we do not sanction appellant for filing this appeal.

In accordance with a joint motion of Bradt and appellee Judy Sebek following a settlement between them, this Court issued a June 3, 1999 interlocutory order reversing the award of sanctions in favor of Sebek and rendering a take-nothing judgment as to her.

We affirm the judgment as to the remaining defendants.

END OF DOCUMENT

APPENDIX C

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MARGARET G. MIRABAL
MICHOL O'CONNOR
DAVIE L. WILSON
ADELE HEDGES
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RE: Court of Appeals Number: 01-96-00943-CV
Trial Court Case Number: 9053676

Style: Bradt, L.T.
v.
Sebek, Judy, et al

April 7, 2000
Re: 01-96-00943-CV

The Court today, DENIED both appellant's motion for rehearing and motion for rehearing en banc in the above referenced cause.

Respectfully yours,
Margie Thompson, Clerk

/s/ Joann Aguirre
Joann Aguirre, Chief Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
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Austin, Texas 78711 (512) 463-1312

August 10, 2000

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RE: Case Number 00-0524
Court of Appeals Number: 01-96-00943-CV
Trial Court Number: 90-53676

Style: L.T. Bradt
v.
JUDY SEBEK, EARLE LILLY, PIRO & LILLY, DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TEYLORK LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES and JOEL A. NASS

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by Julio C. Alvarado
Julio C. Alvarado, Deputy

cc: Ms. Margie Thompson, Clerk
Mr. Charles Bacarisse

APPENDIX E

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

September 28, 2000

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RE: Case Number 00-0524

Court of Appeals Number: 01-96-00943-CV

Trial Court Number: 90-53676

Style: L.T. BRADT
v.
JUDY SEBEK, EARLE LILLY, PIRO & LILLY, DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES and JOEL A. NASS

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms Margie Thompson, Clerk
Mr. Charles Bacarissee